IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 727 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE
HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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VINUBHAI TEJABHAI KALASAVA - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR MJ BUDDHBHATTI for Appellant(s) : 1,
MR KP RAWAL, APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

and

HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

Date : 07/02/2007

ORAL JUDGMENT
(Per : HONOURABLE MR.JUSTICE A.L.DAVE)

The appellant came to be tried by Sessions Court, Panchmahals at Godhra in Sessions Case No.90 of 1999 for the offence of murder of Chhaganbhai Nathabhai Kalasava allegedly committed by him on 30th November, 1998 at about 10.00 p.m. in the house of the deceased by strangulation. The Trial Court, by judgment and order dated 7th July, 1999, accepted the prosecution case and convicted the appellant – accused for the offence of murder and sentenced him to undergo imprisonment for life and to pay a fine of Rs.1,000/-, in default, to undergo further imprisonment for a period of six months. Aggrieved by the said judgment and order, the original accused has preferred this appeal.

2. The prosecution facts, in nutshell, are that the appellant and the deceased Chhaganbhai Nathabhai are interrelated and they stay at village Bhugedi of Santrampur Taluka of District Panchmahals. The deceased happened to be nephew of the appellant. The case of the prosecution is that the deceased had earlier molested the wife of the appellant and aqain on 2nd occasion also about 15 days prior to the incident, he molested the appellant's wife. The appellant, therefore, had a grievance against him and on the day of the incident, the appellant went to the house of the deceased and caused his death by strangulation. When the deceased was attacked by the appellant, he raised cries for help and as a result,

Tihabhai Tejabhai, his wife Jetiben and Kalubhai Tejabhai rushed to the house of the deceased and found the appellant strangulating the deceased in a mounted position over the deceased. When they tried to intervene, it is alleged that the appellant turned on them and, therefore, they escaped. Later on, they went to the place to find that the victim had expired. They waited for the whole night and later on sent messengers to call the parents of the deceased who arrived in the evening of the next day. Thereafter, the F.I.R. was lodged by Tihabhai Tejabhai. On the basis of F.I.R., offence was registered by Fatepura Police and investigation started. The police, having collected evidence against the appellant, filed chargesheet in the Court of J.M.F.C., Santrampur who, in turn, committed the case to the Court of Sessions and Sessions Case No.90 of 1999 came to be registered.

2.1 The Sessions Court framed charge against the accused – appellant at Exh.2 for the offence of murder punishable under Section 302 and for causing intentional insult with an intention to commit breach of peace under Section 504 of I.P.C. The accused pleaded not guilty to the charge and claimed to be tried.

2.2 The prosecution adduced evidence and the Trial Court, by judgment and order dated 7th July, 1999, found that the prosecution was successful in establishing charge of murder against the appellant -

accused and recorded conviction therefor and awarded sentence, as stated above. The Trial Court found that the charge for the offence punishable under Section 504 of I.P.C. was not proved and, therefore, it recorded acquittal of the accused therefor.

3. Learned advocate Mr. Buddhbhatti appearing for the appellant submitted that the prosecution case depends mainly on evidence of two witnesses who claimed to be eye-witnesses. Mr. Buddhbhatti submitted that witness Tihabhai Tejabhai in his first version, as emerging from the F.I.R., has indicated that there was a quarrel between the appellant and the accused just before the incident. They saw both of them in a scuffle, grappling with each other and thereafter, the appellant pushed the victim to the floor, mounted over him and strangulated him and thereafter, the accused went away. Mr. Buddhbhatti, therefore, submitted that here is a case which would attract Exception 4 to Section 300 of I.P.C. Mr. Buddhbhatti, in all fairness, does not plead for a clean acquittal but he says that the case would fall under Exception 4 to Section 300 and, therefore, the conviction may be altered from one for murder to culpable homicide not amounting to murder, punishable under Section 304 of I.P.C.

4. Learned APP has opposed this appeal. According to him, although the F.I.R. indicates that there was scuffle and/or grappling between the victim and the appellant relating to the incident of

molestation of wife of the appellant preceding the actual incident of attack by the appellant and strangulation, the same does not appear in the deposition of the first informant or in the deposition of any other eye-witness. The deposition of these witnesses clearly indicates that the appellant went to the house of the victim, assaulted him and caused his death by strangulation. No presumption or inference can be drawn that something must have happened between the two which resulted into the incident when there is no such evidence. Mr. Rawal also submitted that even the defence has not pleaded Exception 4 to Section 300 while conducting the trial. In his statement under Section 313 also, the accused – appellant has said that he is falsely involved in the incident with a view to grab his property. The plea taken by the appellant at this stage is an altogether new plea not supported by any evidence and, therefore, the appeal may be dismissed.

5. We have examined the record and proceedings of the case in light of submissions made by rival sides.

6. Since death of the deceased by strangulation at the hands of the appellant is not in dispute, we do not propose to discuss the evidence on other aspects particularly, the medical evidence.

6.1 The prosecution case, apart from medical

evidence, depends mainly on the deposition of the first informant Tihabhai Tejabhai examined at Exh.5. He says that Chhagan was strangulated by the appellant at about 10.00 p.m. The incident occurred in the house of the victim. The dispute was on account of ladies. He heard a cry of Chhagan for rescue. He, therefore, went there and found that the accused – appellant was strangulating victim Chhagan. At that time, another witness Kalubhai Tejabhai was also present, who is the brother of this witness. The appellant turned on them and, therefore, they went away. The witness said that later on, they went there to find that Chhagan had expired. He sat there the whole night and next morning Jiva Lala, Magan Lala, Punja Manji, Rama Puja etc. arrived and he informed them about the incident. The parents of the deceased had gone out of town. Therefore, they sent Ramesh and Soma to call the parents of deceased Chhagan. They went to Ahmedabad to call them and came back in the evening next day. Thereafter, the police was informed. Thereafter, they went to the Police Station at Sukhsar and from there, they were sent to Fatepura Police Station where they lodged an F.I.R.

6.2 During cross-examination, he says that the incident occurred at about 10.00 p.m.. Though there is a dispute going on for partition of 8 acres of land amongst four brothers of the witness, he denies suggestion that the appellant did not strangulate the deceased and that the appellant was falsely

implicated in the F.I.R.

6.3 Another witness Kalubhai Tejabhai is examined at Exh.16. He also says that the incident occurred at about 10.00 p.m. He heard shouts of Chhagan and on hearing the shouts, he, alongwith his brother Tihabhai and his wife Jetiben, rushed to the spot. They saw that the appellant was strangulating the deceased. The deceased was lying on the floor and the appellant was throttling him. The appellant went away thereafter and the victim's dead body remained there as the victim had already passed away. He also says that the incident occurred because of a dispute on ladies. This witness, during cross-examination, admits that it takes about 10 minutes to reach the house of the victim from his own house and that when they reached there, they found that Chhagan had already expired. He says that Tiha and his wife had reached earlier. He denies suggestion that he has not seen the incident.

6.4 The prosecution has not examined wife of Tihabhai as an eye-witness. From the above evidence, it is clear that both the witnesses have rushed to the spot on hearing shouts raised by the deceased. They are consistent about the version that when they went there, the deceased had fallen to the floor, the appellant had mounted over him and was throttling him. The cause of death, as certified by the doctor, is asphyxia due to throttling. Nothing emerges during cross-examination of either of the witnesses

to render their deposition doubtful. It is true that the first informant Tihabhai has chosen not to say anything about the scuffle and grappling between the two, which version he has given in his F.I.R. but unfortunately, at the trial, the witness has not been confronted with his version in the F.I.R. F.I.R. by itself is not a substantive piece of evidence. It can only be used for corroboration or contradiction and the defence has failed to make use of this position at the trial.

7. What emerges, therefore, is that the appellant went to the house of the deceased, attacked him and ultimately when the deceased fell to the ground, he mounted over him, and throttled him which resulted into death of the deceased. The incident of molestation of wife of the appellant appears to have occurred about 15 days prior to the incident and not at the time of or within the proximity of the time of the incident. Be that as it may. This is the version that emerges from the F.I.R. In substantive evidence, there is not even a whisper about molestation of the wife of the accused which may have enraged him. There is not even a suggestion to that effect. There is no evidence to show that at the time of the incident, there was any altercation or grappling or scuffle between the two. Under the circumstances, the evidence suggests that the appellant went to the house of the deceased at about 10.00 p.m. and caused his death by strangulation. There is no other justification coming from the

defence except that he is falsely implicated to grab his property. In this set of circumstances, we are of the view that the defence raised that the plea taken by the appellant about attracting Exception 4 to Section 300 cannot be accepted. In the decision in case of **SANDHYA JADHAV (SMT) vs. STATE OF MAHARASHTRA [(2006) 2 SCC (Cri) 394]** relied upon by learned advocate for the appellant, it has been held that all ingredients of Exception 4 must be satisfied for the benefit thereof to accrue to the convict. The four requirements of Exception 4 are that the death was caused

(a) without premeditation

(b) in a sudden fight

(c) without the offender having taken undue advantage or acted in a cruel and unusual manner and

(d) the fight was with the person killed

8. In the instant case before us, we do not have any material even to suggest that there was any fight between the two, leave aside that it was a sudden fight. There is no evidence to suggest that the incident occurred without premeditation. On the contrary, the appellant seems to have gone to the house of the deceased at about 10.00 p.m. at night for no ostensibly justifiable cause. Under the circumstances, all four ingredients of Exception 4 to Section 300 cannot be said to have been satisfied and, therefore, the same would not be attracted in the present case.

9. For the foregoing reasons, we are of the view that the Trial Court was justified in concluding that the prosecution was successful in establishing charge of murder against the accused – appellant. We do not find any reason for any interference in the said judgment and order. The appeal, therefore, must fail and stands dismissed. The judgment and order dated 7th July, 1999 rendered by learned Sessions Judge, Panchmahals at Godhra in Sessions Case No.90 of 1999 is confirmed.

(A.L. Dave, J.)

(Bankim N. Mehta, J.)

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